the publication is perfectly consistent with an indication that it is the conduct of the councillors which needs investigating. If that is so, then to establish the defence of fair comment the defendant would have to identify the facts concerning the conduct of the plaintiff in relation to his own affairs or funds of the Council which justified the suspicions implicit in the questions. No attempt was made to identify, let alone prove, such facts.

Furthermore, the trial does not appear to have been conducted on the basis that the defendant was commenting on the report of the allegations made in Parliament. The subject of public interest which was identified for the purpose of s. 377(8) was "the expenditure of the Cyclone Winifred Disaster Relief Fund and the use of Shire Council assets, labour and funds for private purposes". Thus, the defendant's own pleading confirms that the subject of public interest which was the basis of the comment was the conduct of the plaintiff and others in relation to Council assets and their use for the benefit of the plaintiff.

Order

The appeal should be allowed, and the verdict of the jury should be restored.

JOHANN MANFRED WEISSENSTEINER

v.

THE QUEEN

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON & McHUGH JJ.
[F.C. 93/051]
17 NOVEMBER 1993

CRIMINAL LAW: Charge of murder and of theft of a sea-going vessel - Right of accused to remain silent during trial - Comment by judge on the accused remaining silent and the accused's refusal to explain facts perceived to be within his knowledge - Directions on inference of guilt - Whether trial judge had erred in his directions to the jury.

APPEAL: The jurisdiction of a judge in Queensland to comment on the failure of an accused to give evidence - Whether the judge's directions to the jury compromised the accused's position and caused a miscarriage of justice.

The appellant appeals against his conviction on a charge of murder of one Hartwig Bayerl (Bayerl) and Susan Zack (Zack) and of the theft of Bayerl's boat, the "Immanuel". The appellant had chosen not to testify at his trial. The trial had been held in Queensland, Australia. In Queensland, a trial judge is not barred from commenting on the failure of an accused to give evidence. When directing the jury, the trial judge had reminded them that the accused bore no onus to prove anything, was not obliged to testify or call evidence and that no inference of guilt could be drawn from the accused's failure to do so. However, his Honour proceeded to point out that there was no evidence from the accused "to add to, to explain, or to vary, or contradict the evidence" put before the jury by the prosecution. His Honour also said, [The prosecution] "seeks to have you infer guilt from such facts as it is able to prove to your satisfaction. Such an inference may be more safely drawn from the proven facts when the accused elects not to give evidence of relevant facts which can be easily perceived to be in his knowledge."

The appellant argued that the learned judge's directions to the jury had been against his right to silence and went further to say that the authorities which allow for judicial comment to be made as to the accused's failure to supply the

facts known only to him were inconsistent with an accused's right to silence.

The salient facts of the case were these. Bayerl and Zack had intentions of cruising the Pacific together and both had expanded considerable sums of money on alterations to the "Immanuel" in order to fortify and to fit her out for the journey. The appellant had applied for work as a casual labourer and had agreed to work for no wages in return for the chance to follow them in their voyage. Zack was over 4 months pregnant and had kept in touch with her relatives, informing them of her plans regarding the voyage and expected delivery. The three departed Cairns in late November 1989. By late December, at various ports, only the appellant was observed on board. He gave differing versions as to the whereabouts of Bayerl and Zack to acquaintances and investigators and despite extensive enquiries, the two could not be traced. Items of an intimate nature belonging to them were found aboard and it was discovered that they had not operated their bank accounts. Since they embarked on their voyage. The appellant had assumed sole possession of the vessel. The appellant whilst in custody had apparently confided in a friend and had said "They have no bodies. They have no proof."

Held:

[1] Not every case calls for explanation or contradiction in the form of evidence from the accused. When an accused elects to remain silent at trial, that silence cannot amount to an implied admission of guilt. It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of evidence which has been given and which the jury is required to consider, that they may take it into account solely for the purpose of evaluating that evidence. In determining whether the prosecution has satisfied the standard of proof to the requisite degree, it is relevant to assess the prosecution case on the footing that the accused has not offered evidence of any hypothesis or explanation from facts which the jury perceives to be within his knowledge and which explanation is consistent with his innocence.

[2] In the present case, the circumstances are not consistent the couple having voluntarily relinquished the boat to the appellant and disappearing from sight. The facts call for an explanation of the possession of the boat and its contents in the hands of the appellant. A person using property belonging to persons who have recently disappeared without a trace may be implicated not only in the theft of the property but in the disappearance itself. The prosecution case was that the jury should draw from the evidence the inference not only that the couple were dead but that they were murdered by the appellant. These were inferences which were open upon the evidence. A direction of the kind given by the learned judge essentially involved no more than a statement of the obvious.

Per Gaudron & McHugh JJ:

The directions to the jury were defective in that they were couched in terms of the failure to give evidence, rather than in the terms of the unexplained facts. They suggested the appellant's failure to give evidence in relation to some matters which entitled the jury to more readily draw an inference of guilt from prosecution's case. The appellant's failure to given evidence or to explain the disappearance of the couple were not matters that could be properly be taken into account on any of the charges and constitute a serious miscarriage of justice.

[Appeal dismissed].

Cases referred to:

Bridge v. The Queen [1964] 118 CLR 600 ***(refd)***
Blatch v. Archer [1774] 1 Cowp. 63; 98 ER 969 ***(refd)***
R. v. Burdett [1820] 4 B. & Ald. 95; 106 ER 873 ***(refd)***
Reg. v. Kops [1893] 14 NSWR 150 ***(refd)***
Kops v. The Queen [1894] AC 650 ***(refd)***
Tumahole Bereng v. The King [1949] AC 253 ***(refd)***
Morgan v. Babcock & Wilcox Ltd. [1929] 43 CLR 163 ***(refd)***
May v. O'Sullivan [1955] 92 CLR 654 ***(refd)***
Petty v. The Queen [1991] 173 CLR 95 ***(refd)***
Reg. v. Mitchell [1892] 17 Cox CC 503 ***(refd)***
Chandler [1976] 63 Cr. App. R. 1 ***(refd)***
Reg. v. Fellowes [1987] 2 Qd R. 606 ***(refd)***
Woon v. The Queen [1964] 109 CLR 529 ***(refd)***
Reg. v. Director of Serious Fraud Office; Ex parte Smith [1993] AC 1 ***(refd)***
Bataillard v. The King [1907] 4 CLR 1282 ***(refd)***
R. v. Templeton & Ors. [1922] St. R. Qd 165 ***(refd)***
Reg. v. Phillips & Lawrence [1967] Qd R. 237 ***(refd)***
Reg. v. Hocking [1988] 1 Qd R. 582 ***(refd)***
Cyril Waugh v. The King [1950] AC 203 ***(refd)***
Reg. v. Bathurst [1968] 2 QB 99 ***(refd)***
Reg. v. Sparrow [1973] 57 Cr. App. R. 352; [1973] 1 WLR 488 ***(refd)***

Wilson v. Buttery [1926] SASR 150 ***(refd)***
Reg. v. Guiren [1962] NSWR 1105 ***(refd)***
Reg. v. Whinfield, Unreported, 16 September 1986 ***(refd)***
Reg. v. Rhodes [1899] 1 QB 77 ***(refd)***
Waugh v. The King [1950] AC 203 ***(refd)***
Mutch [1972] 57 Cr. App. R. 196 ***(refd)***
Gallagher [1974] 59 Cr. App. R. 239 ***(refd)***
Stewart v. H.M. Advocate [1980] SLT 245 ***(refd)***
Haw Tua Tua v. Public Prosecutor [1982] AC 136 ***(refd)***
Fitzpatrick v. Walter E. Cooper Pty. Ltd. [1935] 54 CLR 200 ***(refd)***
Watts v. Rake [1960] 108 CLR 158 ***(refd)***
Reg. v. Falconer [1990] 171 CLR 30 ***(refd)***
Raviraj [1986] 85 Cr. App. R. 93 ***(refd)***
Reg. v. McNamara [1987] VR 855 ***(refd)***
Purdie v. Maxwell [1960] NZLR 599 ***(refd)***
O'Sullivan v. Stubbs [1952] SASR 61 ***(refd)***
R. v. Steinberg [1931] OR 223 ***(refd)***
Bruce v. The Queen [1987] 61 ALJR 603; 74 ALR 219 ***(refd)***
Anderson v. Geerlings [1988] 6 MVR 392 ***(refd)***
Reg. v. Hallocoglu [1992] 29 NSWLR 67 ***(refd)***
R. v. Aves [1950] 2 All ER 330 ***(refd)***
Lughlin [1951] 35 Cr. App. R. 69 ***(refd)***
Trainer v. The King [1906] 4 CLR 126 ***(refd)***

Legislation referred to:
Crimes Act 1958 (Vict.), s. 399(3)
Crimes Act 1990 (NSW), s. 407(2)
Criminal Code, s. 618A
Criminal Law and Evidence Amendment Act 1891 (NSW), s. 6
Evidence Act 1906 (W.A.), s. 8(1)(c)
Evidence Act 1910 (Tas), s. 85(1)(c)
Evidence Act 1929 (S.A.), s. 18(1)II
Evidence Act 1939 (N.T.), s. 9(3)
Evidence Act 1971 (A.C.T.), s. 74(1)
Evidence Act 1977, s. 8(1)

Other Sources referred to:
A History of English Law, Holdsworth, (1944) Vol. 9, 3rd Edn., p. 196
A History of the Criminal Law of England, (1883), Vol. 1, p. 441
A Treatise on Judicial Evidence (1825) p. 241
Cross on **Evidence**, 4th Aust. Edn. (1991), par. 7215
Parliamentary Debates (Hansard), South Australia, House of Assembly [1882] July, pp. 280, 281, 332, 333, 394-395
Phipson on **Evidence**, 14th Edn. (1990), para 5-02
"Silence as evidence", Young, (1922) 66 Australian Law Journal 675
"The right to comment on the failure of the defendant to testify", Andrew Bruce [1932] 31 Michigan Law Review 226, at p. 233

For the appellant - Legal Aid Office (Queensland)
For the respondent - R.N. Miller, Director of Prosecutions (Queensland)

JUDGMENT

Mason CJ, Deane & Dawson JJ:

The appellant was convicted of the murder of Hartwig Bayerl and Susan Zack and of the theft of a vessel, the "Immanuel", which had been owned by Bayerl. Bayerl and Zack had met in Cairns in April 1989 at the Cairns Cruising Yacht Squadron and commenced to live together. The "Immanuel" was a 36-foot cutter upon which Bayerl had spent most of his savings. In the following months Zack spent most of her savings on alterations to the boat. Zack's parents, who lived in England, visited her in Australia in June 1989 and Bayerl asked Zack's father whether he could marry Zack. Her parents urged her to delay the wedding as she had only known Bayerl a few months. She agreed and her parents said that if the couple still wanted to get married after cruising the Pacific together, they would fly out for the wedding.

The appellant answered an advertisement by Bayerl for casual labour to work on the boat in August 1989. He agreed to work for no wages and, in return, Zack and Bayerl agreed to take him on their cruise. The accused suggested to the police that there may have been more to this arrangement, but refused to elaborate. The appellant and Bayerl were both Austrian and they soon became friends. The three worked hard on the alterations to the boat, often late into the night.

The "Immanuel" was launched at the end of September 1989, but was put back into dry dock because it sprang a leak. It was re-launched a little over two weeks later. Bayerl and Zack wound up their affairs in Cairns late in October 1989. They sold Zack's car. They were keen to set out on their cruise because the Coral Sea is prone to cyclones between November and March. The last known contacts with Bayerl and Zack were in late November. Zack wrote a letter to her sister which was postmarked 22 November 1989. She was over four months pregnant and saw her doctor on 24 November 1989. She said that she would go to a doctor or clinic once a month and hoped to have the baby in hospital, possibly in Cairns. Zack saw a friend in Cairns late in November and said that they were intending to leave that day. She wrote a cheque dated 26 November and used her credit card at the Cairns Liquor Barn on 27 November.

Bayerl rang his mother in Austria on 26 November 1989 and said that he was leaving soon. There was evidence given by one witness who claimed to have seen Bayerl early in December 1989, but this date was not supported by any other evidence. In late November 1989 the boat was seen near Fitzroy Island, about 15 nautical miles from Cairns, with the appellant, Bayerl and Zack aboard. Bayerl and Zack were never seen again. The "Immanuel" was seen again in Cairns harbour in late December 1989 and in January 1990 but only the appellant was observed to be on board.

On 3 January 1990, the appellant asked the Australian Customs Service about a customs clearance. Because he had contravened the conditions of his multiple journey visit visa, his visa was cancelled, effectively requiring him to leave Australia by 25 January 1990. He said that this would not fit in with his plans because the boat's owner, Bayerl, was in Kuranda, a town on the edge of the Atherton Tablelands a short distance to the north-west of Cairns.

A port officer in Cairns was telephoned by Zack's mother in an effort to convey to Zack the news that her aunt had died. The officer spoke to the appellant on board the "Immanuel" on 4 January 1990 who said that Bayerl and Zack were not on board and would be on the Atherton Tablelands until about 10 January 1990. The appellant promised to pass on the message from Zack's mother.

The "Immanuel" appears to have left Cairns harbour by 7 January 1990, but it had returned by 12 January when the appellant told an immigration official that he was now intending to meet Bayerl in Papua New Guinea and would leave Australia permanently in the next few days. The appellant cleared Australian customs on 16 January 1990 and presumably left early the next morning.

The appellant spent some eight months cruising between various Pacific islands. He told a number of people that he had been turned away from Bougainville by the Papua New Guinea Navy. He arrived alone on board the "Immanuel" in Kosrae on 21 February 1990 and stayed there for two or three days. He then sailed to Kiribati, arriving on 16 March 1990. He was due to leave by 23 March 1990. He sailed on to Majuro in the Marshall Islands and for three months between March and June worked there as a cabinet-maker. In order to comply with Marshall Islands visa requirements, he returned to Kiribati on 25 June 1990, where he remained at least until 6 July before returning to Majuro on about 11 July 1990.

As a result of Interpol searches for the "Immanuel" and Bayerl and Zack, the appellant was taken into custody by the Marshall Islands authorities in August 1990. Australian police arrived in Majuro late in August and conducted a series of tape-recorded interviews with the appellant on 27, 28 and 30 August and 2 September 1990. The appellant attempted to escape from custody on 3 September 1990 by swimming to a nearby island but was recaptured. On 4 September a judge made an order allowing the appellant to return to Australia and he agreed to return with the police. He was charged in Cairns on 6 September 1990 with the murder of Bayerl and Zack and the theft of the "Immanuel".

The prosecution case against the appellant was entirely circumstantial. There was abundant evidence from which the jury might have concluded that Bayerl and Zack were not only missing but dead. All contact between them and their respective families ceased notwithstanding that they had previously kept in regular contact. They did not attempt to operate their bank accounts. There was no record of any medical treatment of Zack or the birth of a child. Nappies, maternity bras and vitamin supplements which Zack had presumably bought for her pregnancy remained on board the "Immanuel" when it was searched by the police at Majuro in August 1990.

Upon the assumption that Bayerl and Zack were dead, there was evidence from which it might have been concluded that the appellant had not only stolen the boat but had also been involved in their deaths. They had spent a large amount of money on the "Immanuel" of which the appellant had assumed sole possession. On board the vessel were many of Zack's clothes, her diving watch and a gold bracelet which she wore almost continuously. Also on board were opals which Bayerl intended to sell around the Pacific together with an opal pendant which Bayerl wore when selling opals. There was Bayerl's German bible, given to him by his father, which Bayerl always took with him, even on camping trips, and to which he referred regularly. There was camping equipment

belonging to Bayerl and Zack, and, concealed, there were two rifles which had been in Bayerl's possession since 1986. There was evidence that Bayerl was a well-organized traveller who always ensured that he was well-equipped. The presence of the various items on the boat was inconsistent with Bayerl or Zack having left it voluntarily.

In his travels around the Pacific, the appellant told a series of inconsistent stories about the identity of the owner of the boat and the whereabouts of Bayerl and Zack. His original story, told to Australian officials in early January 1990, was that Bayerl and Zack were in Kuranda or on the Atherton Tablelands. In the middle of January he told a customs official that Bayerl was in Papua New Guinea and that he would be picking him up from Port Moresby.

When he first landed at Kosrae on 21 February 1990, the appellant told a sailor that he had bought the boat from an old man in Cairns. He gave a similar story to a customs official in Kosrae and again to his employers in Majuro in about April 1990.

When he returned to Kiribati in late June 1990, the appellant told the police that Bayerl had given or lent him the boat for cruising and that Bayerl and Zack were in Kununurra in the north-west of Australia. A week or two later, the appellant told a customs officer in Kiribati that Bayerl owned the boat and was staying at Zack's place in Cairns.

On 17 August 1990, the appellant told the Majuro police that Bayerl and Zack were in Western Australia. He gave the same story to the Australian police in Majuro, adding that he had dropped them off in Cairns with minimal equipment and that they had intended to make their own way to Kununurra. He said that they were now living off the land at Kununurra and that he was waiting in Majuro for a letter from Bayerl. Extensive inquiries made in Kununurra and the surrounding regions revealed no trace of Bayerl or Zack, although some people remembered Bayerl from a previous visit in 1986.

After his arrest, the appellant told two friends in Majuro that Bayerl and Zack had smuggled arms to Bougainville and that he had dropped them off there. He said he was waiting in Majuro for contact from Bayerl.

In Kiribati in March 1990, the appellant repainted the name of the boat as "Mani" which he said was a contraction of his own name, Manfred, although it could also be a contraction of "Immanuel".

Whilst the appellant was in custody in Majuro, a friend urged him to return to Australia to face charges and the appellant said, "But they have nothing. They have no bodies. They have no proof." While in gaol in Australia the appellant told a fellow prisoner, "Die kan die zwei nicht finden", which the prisoner translated as, "They'll never find those two", although a more accurate translation is "They cannot find those two".

The appellant gave no evidence at his trial, nor did he call any evidence.

The appellant's appeal against his conviction was dismissed by the Queensland Court of Appeal. He now appeals to this Court. The only ground of appeal which was argued is that the trial judge erred in directing the jury that they might more safely draw an inference of guilt from the evidence because the appellant did not give evidence of relevant facts which could be perceived to be within his knowledge.

The learned trial judge adverted in his summing-up to the use which the jury might make of the appellant's silence at his trial on two occasions. He said:

> As has already been said to you, the Crown bears the onus of satisfying you beyond reasonable doubt that the accused is guilty of the offences with which he is charged. The accused bears no onus. He does not have to prove anything. For that reason he was under no obligation to give evidence. You cannot infer guilt simply from his failure to do so. The consequence of that failure is this: you have no evidence from the accused to add to, or explain, or to vary, or contradict the evidence put before you by the prosecution. Moreover, this is a case in which the truth is not easily, you might think, ascertainable by the prosecution. It asks you to infer guilt from a whole collection of circumstances. It asks you to draw inferences from such facts as it is able to prove. Such an inference may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge. You might, for example, think in this case it requires no great perception that the accused would have direct knowledge of events which can be canvassed only obliquely from the point

> of view of seeking to have you draw an inference from the evidence which has been led by the Crown. The use that you make of the fact that there is no evidence given or called by the defendant in these proceedings is that.

Subsequently he said:

> I remind you that the onus is on the prosecution and the fact that the accused has not given or called evidence proves nothing. I remind you that the consequence of that circumstance is that you have no evidence from the accused to explain the evidence put before you by the prosecution, and that moreover, this is a case where the truth is not easily ascertainable by the prosecution. You remember rather here it seeks to have you infer guilt from such facts as it is able to prove to your satisfaction. Such an inference may be more safely drawn from the proven facts when the accused elects not to give evidence of relevant facts which can be easily perceived to be in his knowledge.

In Queensland a trial judge is not precluded from commenting on the failure of an accused to give evidence as judges are in other jurisdictions (cf. Crimes Act 1900 (NSW), s. 407(2); Crimes Act 1958 (Vict.), s. 399(3); Evidence Act 1939 (NT), s. 9(3)). However, the right of the jury to take into account the silence of the accused does not stem from the right of the trial judge to comment upon it. Even in those jurisdictions where comment is prohibited, the jury may consider the accused's silence. The prohibition merely forbids the trial judge from reminding them that they may do so and informing them of the way in which they may properly do so. Where the legislature has forbidden comment it has presumably done so because it considers that it is more in the interests of the accused to prohibit than to allow comment (See *Bridge v. The Queen* [1964] 118 CLR 660, at p. 615). In a modern context, however, where at least some members of every jury will know and be conscious of the fact that an accused can give evidence, that approach may now be mistaken. The jury may read more into the silence of an accused than they are entitled to do and, as a result, the accused may be at a greater disadvantage than if comment by the trial judge were allowed.

The reasoning process whereby the failure of a party to give or to call evidence is taken into account in evaluating evidence which is before the court has long been recognized by the law and is not confined to the criminal law. In *Blatch v. Archer* Lord Mansfield observed ([1774] 1 Cowp 63, at p. 65 [98 ER 969, at p. 970]):

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

And in *R. v. Burdett*, a case which was decided before an accused could give evidence on his or her own behalf, Abbott CJ said ([1820] 4 B. & Ald. 95, at pp. 161-162 [106 ER 873, at p. 898]):

> In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?

R. v. Burdett was relied upon in *Reg. v. Kops* [1893] 14 NSWR 150, a case concerning the effect of legislation in New South Wales which in 1891 (Criminal Law and Evidence Amendment Act 1891 (NSW), s. 6 - now Crimes Act 1900 (NSW), s. 407) made an accused person a competent but not compellable witness. It was held by a Full Bench with two dissentients that a trial judge may invite the jury to draw inferences adverse to the accused from the fact that, by not giving evidence, the accused has failed to contradict or explain matters upon which incriminating evidence has been given by the prosecution, and which, if untrue, it must be within the power of the accused to contradict or explain. The two judges who dissented (Innes and Stephen JJ.) did so on the basis that a comment of the kind sanctioned by the majority would virtually compel the accused to go into the witness box although the statute said that the accused was not a compellable witness. An appeal to the Privy Council was dismissed with the observation that (*Kops v. The Queen* [1894] AC 650, at p. 653):

> There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact

> that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases. But on the other hand there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary.

In *Tumahole Bereng v. The King* [1949] AC 253 the Privy Council pointed out that there are limits upon the kind of comment which might properly be made. Their Lordships observed (*ibid*., at p. 270) that an accused admits nothing by exercising his right to remain silent at his trial. Nevertheless the failure of the accused to give evidence "may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent [the accused's silence] cannot be used as a make-weight."

In *Morgan v. Babcock & Wilcox Ltd*. [1929] 43 CLR 163 the defendant company was convicted of paying a bribe. At its trial it called no evidence.

Upon appeal to this Court, Isaacs J. referred to *Blatch v. Archer* and said *(ibid*., at p. 178):

> Here the prosecution could not possibly have produced stronger evidence, but it was in the power of the defence to have repelled the inference that arises from the evidence as it stands. ... Consequently, since the affirmative evidence in the case raises, to say the least, a strong probability that it was the Company that paid, or caused to be paid, the bribe demanded by Maling, the silence of the Company, and its failure to explain, materially weakens any attempt to suggest in its favour possible hypotheses of innocence.

The same approach is to be found in *May v. O'Sullivan* [1955] 92 CLR 654, at pp. 658-659. There the Court said in a well-known passage:

> Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question it may in some cases be legitimate ... for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear: cf. *Morgan v. Babcock & Wilcox Ltd*., per Isaacs J. ([1929] 43 CLR, at p. 178). But to say this is a very different thing from saying that the onus of proof shifts. A magistrate who has decided that there is a 'case to answer' may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made 'a *prima facie* case', but it does not follow that in the absence of a 'satisfactory answer' the defendant should be convicted.

The same principle was put in different words by Windeyer J. in *Bridge v. The Queen* as follows ([1964] 118 CLR at p. 615):

> An accused person is never required to prove his innocence: his silence can never displace the onus that is on the prosecution to prove his guilt beyond reasonable doubt. A failure to offer an explanation does not of itself prove anything. Nor does it, in any strict sense, corroborate other evidence. But the failure of an accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true. That is to say a failure to deny or explain may make evidence more convincing, but it does not supply its deficiencies. A direction by the judge on such matters ... might no doubt be helpful to the accused in some cases.

We have quoted rather more extensively from the cases than would otherwise be necessary in order to show that it has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.

Of course, an accused may have reasons not to give evidence other than that the evidence would not assist his or her case. The jury must bear this in mind in determining whether the prosecution case is strengthened by the failure of the accused to give evidence. Ordinarily it is appropriate for the trial judge to warn the jury accordingly.

Not every case calls for explanation or contradiction in the form of evidence from the accused. There may be no facts peculiarly within the accused's knowledge. Even if there are facts peculiarly within the accused's knowledge the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution. Much depends upon the circumstances of the particular case and a jury should not be invited to take into account the failure of the accused to give evidence unless that failure is clearly capable of assisting them in the evaluation of the evidence before them.

The argument in support of the appeal centred very largely on the decision of this Court in *Petty v. The Queen* [1991] 173 CLR 95. In that case the Court decided that, at trial, it is not permissible to suggest that an accused's exercise of the right to silence before trial can provide a basis for inferring consciousness of guilt or inferring that a defence raised at trial is a new invention or is otherwise suspect because the accused previously failed to mention it. The decision in *Petty v. The Queen*, therefore, does not determine the present case where the question is whether it is permissible for the trial judge to instruct the jury that inferences available to be drawn from facts proved by the Crown case can be drawn more safely when the accused elects not to give evidence on relevant facts which the jury perceives to be within his or her knowledge.

However, the appellant argued that, just as it is impermissible for the trial judge to suggest that inferences adverse to the accused may be drawn from a previous exercise of the right to silence, so it is impermissible for the trial judge to suggest that inferences adverse to the accused which are available to be drawn from the facts proved by the Crown may be drawn more safely when the accused does not give evidence of relevant facts which must be within his or her knowledge. We do not agree. There is a distinction, no doubt a fine one, between drawing an inference of guilt merely from silence and drawing an inference otherwise available more safely simply because the accused has not supported any hypothesis which is consistent with innocence from facts which the jury perceives to be within his or her knowledge. In determining whether the prosecution has satisfied the standard of proof to the requisite degree, it is relevant to assess the prosecution case on the footing that the accused has not offered evidence of any hypothesis or explanation which is consistent with innocence.

The failure of the accused to give evidence is not of itself evidence. It is not an admission of guilt by conduct. It cannot be, because it is the exercise of a right which the accused has to put the prosecution to its proof. In some other circumstances, silence in the face of an accusation when an answer might reasonably be expected can amount to an admission by conduct (See, e.g., *Reg. v. Mitchell* [1892] 17 Cox CC 503; *Chandler* [1976] 63 Cr App R 1; and the discussion in Young, **"Silence as evidence"**, [1992] 66 Australian Law Journal 675). But when an accused elects to remain silent at trial, the silence cannot amount to an implied admission. The accused is entitled to take that course and it is not evidence of either guilt or innocence. That is why silence on the part of the accused at his or her trial cannot fill in any gaps in the prosecution case; it cannot be used as a makeweight. It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider, that they may take it into account, and they may take it into account only for the purpose of evaluating that evidence. The fact that the accused's failure to give evidence may have this consequence is something which, no doubt, an accused should consider in determining whether to exercise the right to silence. That was recognized in *Reg. v. Kops*. But it is not to deny the right; it is merely to recognize that the jury cannot, and cannot be required to, shut their eyes to the consequences of exercising the right.

We think that the trial judge was correct in his view that this was an appropriate case in which to direct the jury as to the manner in which they might take into account the failure of the accused to give evidence. The prosecution case was that the jury should draw from the evidence the inference, not only that Bayerl and Zack were dead, but that they were murdered by the

appellant. Clearly those were inferences which were open upon the evidence.

Bayerl and Zack disappeared without trace, having last been seen together with the appellant on the boat. Soon after their disappearance the appellant was seen, and held himself out to be, in sole possession of the boat.

The circumstances were not consistent with the couple having voluntarily relinquished the boat to the appellant. They had spent a great deal of money on it. They had well-developed plans to use the boat for the purpose of cruising the Pacific. Their possessions, including camping equipment and items of an intimate nature, were still on board the boat when it was discovered in the appellant's possession. If they had left the boat intentionally, it is unlikely that they would have left all of those possessions behind.

These facts are not merely evidence calling for an explanation of possession of the "Immanuel" and its contents. A person using property which belongs to another who recently disappeared may be implicated not only in the theft of the property, but in the disappearance of that other. The inference is open that involvement in the disappearance provided the opportunity for the theft. Clearly that inference was open to the jury in this case.

It is true that Bayerl had, in the words of one witness, "a unique view of what was going on in the world", a view apparently shared by Zack. He believed that a nuclear holocaust was imminent as the result of a conspiracy involving Catholics and Masons. Consequently the boat was elaborately fitted with equipment including power generators and a water desalinator to enable the couple to live self-sufficiently. Bayerl told friends that he intended to leave Australia without clearing customs so as to elude the conspiracy. He also said on occasions that he intended to live on a Pacific island remote from the holocaust. Whilst it was open to the defence to rely upon these matters, they did not have the result that the other evidence ceased to call for an explanation. In particular, they did not explain how the appellant came to be in possession of the missing couple's personal effects, camping equipment, power generators and water desalinator.

The appellant himself claimed to know where Bayerl and Zack were, although he told inconsistent stories about their whereabouts and about the manner in which he came into possession of the boat. It was significant that, notwithstanding the inconsistencies, the appellant never asserted his ignorance of the whereabouts of Bayerl and Zack or of the reason for their absence.

The appellant, if anyone, could have explained, not only his possession of the boat, but his possession of the boat in the absence of Bayerl and Zack. His failure to give evidence was, therefore, capable of strengthening the prosecution case by enabling the jury, in the absence of any explanation by him, to accept the inferences for which the prosecution contended as the only rational inferences from the evidence. Indeed, in the circumstances of the present case, it appears to us that a direction of the kind given by the learned trial judge essentially involved no more than a statement of the obvious.

Given that a direction of that kind was appropriate, as we think it was, the appellant raises no objection to the form of the direction, that being a form which was approved by the Queensland Court of Criminal Appeal in *Reg. v. Fellowes* ([1987] 2 Qd R 606, at p. 610). Nor does the appellant contend in the circumstances of this case that, if a direction was to have been given, it should have included an instruction that reasons may have existed for the appellant's failure to give evidence which would preclude the jury from using that failure in the manner directed by the trial judge.

For these reasons, we think that the only ground of appeal which was argued must fail and that the appeal should be dismissed.

Brennan & Toohey JJ:

The mere refusal by a suspect to answer police questions relating to the commission of an offence or to advance an innocent explanation of the circumstances which throw suspicion upon him affords no basis for an inference of his guilt: *Petty and Maiden v. The Queen* [1991] 173 CLR 95. If the suspect does not exercise his right of silence but chooses to respond selectively to questions asked or allegations made, his conduct (including his refusal to respond to particular questions or allegations) is evidence to which the jury may have regard and from which, according to the circumstances, an inference may be drawn that he has a consciousness of guilt: *Woon v. The Queen* [1964] 109 CLR 529.

The present case is not concerned with either of these propositions but with another proposition which, though it is classified as one of the categories of the right of silence (*Reg. v. Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1, per Lord Mustill at p. 30), has a different origin and purpose. The question is whether the jury is entitled to attribute any, and what, significance to the absence of testimony by the accused in a criminal trial. *Petty and Maiden and Woon* were cases relating to the responses of a suspect to enquiries by police; the present case relates to the non-exercise by an accused of his statutory right to testify in his own defence at his trial. The former cases relate to the responses of a suspect to the performance of an executive function in circumstances where the suspect's rights are not immediately amenable to judicial protection; the present case relates to the course of proceedings directly under judicial control.

In the long history of criminal trials, the present form of the right of an accused to testify in his own defence is of comparatively recent origin. A century ago, the right did not exist in most jurisdictions. Sir James Fitzjames Stephen, writing in 1883, described the procedure of the English criminal trial at that time (**A History of the Criminal Law of England**, [1883], Vol. 1, p. 441):

> [A]s matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial, and ... he and his wife are prevented from giving evidence in their own behalf. He is often permitted, however, to make any statement he pleases at the very end of the trial, when it is difficult for any one to test the correctness of what is said.

The practice of the courts with respect to the questioning of the accused had changed over the preceding centuries. In the 18th and early 19th centuries, the testimonial incompetence of the accused and his spouse was rested on the notion that interested persons were likely to commit perjury (Holdsworth, **A History of English Law**, Vol. 9, 3rd Edn., (1944), p. 196). But the rule was vigorously attacked by Jeremy Bentham (**A Treatise on Judicial Evidence** [1825], p. 241) and, at the end of the 19th century, the legislature intervened to confer on an accused and his spouse the right to testify on his behalf. It was perceived that self-interest might be an objection to the weight of a witness's evidence but not to the competency of the witness. In Australia, the first legislative intervention was in South Australia: the Accused Persons Evidence Act 1882 (SA). The passage of this legislation through the Parliament was attended with much concern that an accused should not be prejudiced if he refrained from exercising his newly bestowed capacity to testify in his own defence (South Australia, House of Assembly, Parliamentary Debates (Hansard), July 1882, pp. 280, 281, 332, 333, 394-395).

In Queensland, s. 3 of the Criminal Law Amendment Act 1892 (Q.) (56 Vict. No. 3) made a person accused of an indictable offence and the wife or husband of every accused person a competent but not compellable witness. In 1961, this provision was carried into s. 618A of The Criminal Code. In 1977, s. 8 of the Evidence Act 1977 (Q.) reproduced with some variations the earlier enactments. The provision relevant to the present case is s. 8(1):

> In a criminal proceeding, each person charged is competent to give evidence on behalf of the defence (whether that person is charged solely or jointly with any other person) but is not compellable to do so.

In several jurisdictions, similar statutes preclude the making of any comment by the prosecution (Evidence Act 1906 (W.A.), s. 8(1)(c); Evidence Act 1910 (Tas), s. 85(1)(c); Evidence Act 1929 (S.A.), s. 18(1)II; Evidence Act 1971 (A.C.T.), s. 74(1)) and, in some instances, by the judge (Crimes Act 1900 (NSW), s. 407(2); Evidence Act 1939 (N.T.), s. 9(3); Crimes Act 1958 (Vic.), s. 399(3)) on the failure of an accused person to testify. No such provision is to be found in the Queensland statute.

It is readily understandable that a jury would place a guilty complexion on the failure of an accused person to testify if testimony be needed to deny, explain or answer the evidence available to prove guilt. Thus, when Holroyd J. was discussing in *R. v. Burdett* [1820] 4 B. & Ald. 95, at p. 140 [106 ER 873, at p. 890] what we would call today the "evidentiary onus", he referred to the effect of the accused's failure to adduce evidence when it is within his power to adduce it:

> It is established as a general rule of evidence, that in every case the onus *probandi* lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof,

> whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true.

Once juries came to know that an accused is a competent witness in his own defence, it was inevitable that they would take account of an accused's failure to testify when his testimony might be expected to deny, explain or answer the case against him. In *Kops v. The Queen; Ex parte Kops* [1894] AC 650, at p. 653 a challenge was made to a summing up in which the judge drew the jury's attention to the accused's right to testify and his failure to exercise it when his testimony might have explained matters naturally within his knowledge and when an explanation would be important in view of the evidence already given. The Privy Council upheld the propriety of the comment, saying:

> There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases. But on the other hand there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary.

The judicial discretion to comment, thus affirmed by the Privy Council, led the New South Wales legislature to enact a prohibition on any comment on an accused person's failure to give evidence. The prohibition was a legislative attempt to ensure that no adverse inference should arise from the failure by an accused to exercise his statutory right to testify, as Isaacs J. explained in *Bataillard v. The King* [1907] 4 CLR 1282, at pp. 1290-1291:

> A new opportunity had been afforded to a prisoner to establish his innocence if he could. But reasons other than a sense of guilt, such as timidity, weakness, a dread of confusion or of cross-examination, or even the knowledge of a previous conviction, certainly in a summary proceeding, and perhaps in the case of a trial for an indictable offence, might easily prevent the accused person from availing himself of the new means permitted by law. Hence the legislature determined to prevent the enactment, if not used by the prisoner, from being employed as a means of inculpation.

It is questionable whether, now that juries generally know that an accused has a right to testify, it is still conducive to the administration of criminal justice to prevent the judge from directing the jury about the limits of the use which they can make of an accused's failure to testify. However that may be, the Queensland legislation leaves a judge free in an appropriate case to comment on an accused's failure to give evidence.

Counsel for the appellant submitted that any direction which takes as its starting point an accused's decision not to give evidence infringes the right of silence but that submission is inconsistent with the judgment of the Privy Council in *Kops*. Windeyer J. pointed out in *Bridge v. The Queen* [1964] 118 CLR 600, at p. 613 that *Kops* has "remained the generally accepted expression of the law when comment by the judge on the failure of an accused person to give evidence is not expressly forbidden". (See *R. v. Templeton & Ors.* [1922] St. R. Qd 165, at p. 171; *Reg. v. Phillips & Lawrence* [1967] Qd R. 237, at p. 292-293; *Reg. v. Fellowes, Jackson, McGeough & Buttigieg* [1987] 2 Qd R. 606; *Reg. v. Hocking* [1988] 1 Qd R. 582). However, as his Honour noted ([1964] 118 CLR, at p. 614), the courts have had to face the problem of reconciling "the traditional repugnance aroused by any form of compulsory self-incrimination with the adverse inferences that insistently arise from a failure to answer a charge". His Honour stated the limits of the use to which the accused's failure to testify can be put (*ibid.*, at p. 615):

> An accused person is never required to prove his innocence: his silence can never displace the onus that is on the prosecution to prove his guilt beyond reasonable doubt. A failure to offer an explanation does not of itself prove anything. Nor does it, in any strict sense, corroborate other evidence. But the failure of an accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true. That is to say a failure to deny or explain may make evidence more convincing, but it does not supply its deficiencies.

It is important that a trial judge should ensure, especially if any comment is made on an accused's decision not to give evidence, that juries do not use impermissibly the failure to testify. At the

least, the jury must be told that the accused is not bound to give evidence and that the onus remains on the prosecution to prove guilt beyond reasonable doubt (*Cyril Waugh v. The King* [1950] AC 203, at p. 212; *Reg. v. Bathurst* [1968] 2 QB 99, at pp. 107-108). The limited use which can be made of an accused's failure to testify is of special importance when the prosecution case depends upon the drawing of an inference of guilt from the facts proved directly by evidence. In such a case, the jury must not use a failure to testify as a fact, *albeit* in conjunction with other facts, from which they might infer the accused's guilt (In this sense, it may be said that an accused's failure to give evidence "has no evidential value": *Reg. v. Sparrow* [1973] 57 Cr. App. R. 352, at p. 362; [1973] 1 WLR 488, at p. 495). If there is insufficient evidence of the facts from which an inference of guilt could be drawn, a failure to testify cannot supply the deficiency. But the jury may draw inferences adverse to the accused more readily by considering that the accused, being in a position to deny, explain or answer the evidence against him, has failed to do so. In *Wilson v. Buttery* [1926] SASR 150, at p. 154, Napier J. said:

> If the truth is not easily ascertainable by the prosecution, but is probably well known to the defendant, then the fact that no explanation or answer is forthcoming as might be expected if the truth were consistent with innocence, is a matter which the Court or jury may properly consider.

Citing this passage in *Morgan v. Babcock & Wilcox Ltd*. [1929] 43 CLR 163, at p. 178, Isaacs J. held that, as the affirmative evidence in the case raised "a strong probability" that it was the defendant Company that had paid, or had caused to be paid, the bribe the subject of the charge in that case, "the silence of the Company, and its failure to explain, materially weakens any attempt to suggest in its favour possible hypotheses of innocence". In *May v. O'Sullivan* this Court said ([1955] 92 CLR 654, at pp. 658-659):

> After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question it may in some cases be legitimate, as is pointed out in *Wilson v. Buttery*, for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear: cf. *Morgan v. Babcock & Wilcox*, per Isaacs J. [1929] 43 CLR, at p. 178. But to say this is a very different thing from saying that the onus of proof shifts.

It follows that, in Queensland and in other jurisdictions where there is no statutory prohibition against judicial comment, a judge may tell the jury that where the facts which they find to be proved by the evidence can support an inference that the accused committed the offence charged and where it is reasonable to expect that, if the truth were consistent with innocence, a denial, explanation or answer would be forthcoming, the jury may take the accused's failure to give evidence into account in determining whether the inference should be drawn. The jury should be told that the onus remains on the prosecution and that the accused is under no obligation to give evidence, but that "it is legitimate to have regard to the fact that the accused has given no evidence or explanation or satisfactory explanation of the Crown case as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear": *Reg. v. Guiren* [1962] NSWR 1105, at p. 1107.

Moynihan J., in directing the jury on the trial of the appellant for the murder of two people who disappeared in circumstances from which an inference of guilt might have been drawn, said:

> As has already been said to you, the Crown bears the onus of satisfying you beyond reasonable doubt that the accused is guilty of the offences with which he is charged. The accused bears no onus. He does not have to prove anything. For that reason he was under no obligation to give evidence. You cannot infer guilt simply from his failure to do so. The consequence of that failure is this: you have no evidence from the accused to add to, or explain, or to vary, or contradict the evidence put before you by the prosecution.

No objection is taken to this direction, but objection is taken to the passage which followed and which related to the use which the jury could make of the absence of the appellant's evidence in the drawing of an inference of guilt:

> Moreover, this is a case in which the truth is not easily, you might think, ascertainable by the prosecution. It asks you to infer guilt from a whole collection of circumstances. It asks you to draw inferences from such facts as it is able

> to prove. Such an inference may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge. You might, for example, think in this case it requires no great perception that the accused would have direct knowledge of events which can be canvassed only obliquely from the point of view of seeking to have you draw an inference from the evidence which has been led by the Crown. The use that you make of the fact that there is no evidence given or called by the defendant in these proceedings is that.

Later in his summing up, his Honour directed the jury as follows:

> I remind you that the onus is on the prosecution and the fact that the accused has not given or called evidence proves nothing. I remind you that the consequence of that circumstance is that you have no evidence from the accused to explain the evidence put before you by the prosecution, and that moreover, this is a case where the truth is not easily ascertainable by the prosecution. You remember rather here it seeks to have you infer guilt from such facts as it is able to prove to your satisfaction. Such an inference may be more safely drawn from the proven facts when the accused elects not to give evidence of relevant facts which can be easily perceived to be in his knowledge.

No error appears in these directions. The onus of proof is correctly placed on the prosecution. The facts from which an inference of guilt may be drawn are correctly identified as facts which the prosecution is able to prove. The use to which the appellant's failure to give evidence may be put is correctly restricted to the strengthening of an inference of guilt from the facts proved. And the jury is told not to use the appellant's failure to give evidence unless relevant facts "can be easily perceived to be in his knowledge". This additional requirement, which follows a decision of the Court of Criminal Appeal of Queensland in *Reg. v. Whinfield*, Unreported, 16 September 1986, at p. 25, ensures that the drawing of an inference of guilt will not be assisted by an accused's failure to give evidence unless it is reasonable to expect some denial, explanation or answer by the accused to the *prima facie* case made against him.

In the present case, the appellant's several claims to knowledge of the whereabouts or plans of Bayerl and Zack, his possession of their vessel and of their personal possessions and his account of that possession called for an explanation. None was forthcoming. These facts, combined with the long and inexplicable disappearance of Bayerl and Zack and the apparent prevarication of the appellant when explanations had been sought from him, raised a strong *prima facie* case against him. There was no misdirection by the trial judge. The jury, acting in accordance with that direction, was entitled to convict the appellant of the murder of Bayerl and Zack. The appeal should be dismissed.

Gaudron & McHugh JJ:

Johann Manfred Weissensteiner ("the appellant") was convicted in the Supreme Court of Queensland of murdering Susan Zack and Hartwig Bayerl at Cairns between 1 November 1989 and 18 January 1990. He was also convicted of stealing a 36-foot cutter at Cairns on 17 January 1990. That vessel, the "Immanuel", belonged or had belonged to Mr. Bayerl. An appeal to the Court of Appeal against those convictions was unsuccessful (Pincus and McPherson JJ.A, Shepherdson J. dissenting). The appellant now appeals to this Court.

Ms. Zack, an English woman, and Mr. Bayerl, an Austrian, were engaged to be married. It seems that they lived on board the "Immanuel" in Cairns Harbour until the end of November 1989. They were seen by various people in and around Cairns during November. Ms. Zack, who was in the early stages of pregnancy, visited her doctor on 24 November and, it seems, made a small purchase with a credit card on 27 November. Mr. Bayerl telephoned his mother in Austria on or about 26 November. Nothing has been heard of or from them since that time or, at the latest, since early December. In particular, neither has since communicated with his or her parents, although both were previously in regular contact with them.

The appellant was well acquainted with Mr. Bayerl and Ms. Zack. He worked on the "Immanuel" with them for several months in the last half of 1989, preparing the boat for a voyage that Ms. Zack and Mr. Bayerl intended to make in the Pacific Ocean. It may be that the appellant was to accompany them on that voyage.

Very early in January 1990, Ms. Zack's parents, who live in England, tried to contact her to let her know of her aunt's death. They eventually made contact with the port officer at Cairns, Mr. Nucifora. On 4 January, he enquired of the

appellant as to Ms. Zack's whereabouts and was told that she and the owner of the boat were "over in the Tablelands" (presumably, the Atherton Tablelands in the Carina hinterland) and would be back the following week. The appellant undertook to get a note to her.

The account given by the appellant to Mr. Nucifora was slightly different from that given to an immigration officer at Cairns the day before. On 3 January 1990, in the course of informing an immigration officer of a return voyage he intended to make to New Guinea, the appellant said that the owner of the "Immanuel" was visiting friends in Kuranda and would rejoin the yacht in Cairns at the end of the month. Later, on 16 January 1990, he told a customs official, Mr. Golding, that he was to meet the owner of the boat in Port Moresby.

The "Immanuel" was moved from its usual mooring to a more remote one sometime in December 1989. It left Cairns Harbour on about 17 January 1990, a customs clearance having been issued the day before. Thereafter, the appellant and the boat were seen in different places in the Pacific and were finally intercepted in the Marshall Islands. Various personal items belonging to Ms. Zack and Mr. Bayerl were found on board.

When interviewed in Majuro in the Marshall Islands, the appellant indicated that his earlier statement to the port officer in Cairns to the effect that Ms. Zack was on the Tablelands was a lie. Instead, he said that she and Mr. Bayerl had left Cairns with a small pack saying that they were going to Western Australia. He gave other accounts on other occasions: he told a Mr. Dujmovic in Majuro that he had dropped the couple off at Bougainville; in Kiribati he told a customs official that they were in Cairns; he also told a police officer in Kiribati that they were in Kununurra.

In the course of his directions to the jury, the trial judge, Moynihan J., instructed them that the accused bore no onus to prove anything, was not obliged to give evidence and no inference of guilt could be drawn from his failure to do so. However, his Honour went on to point out there was no evidence from him "to add to, or explain, or to vary, or contradict the evidence put before you by the prosecutions" and then said:

> Moreover, this is a case in which the truth is not easily, you might think, ascertainable by the prosecution. It asks you to infer guilt from a whole collection of circumstances. It asks you to draw inferences from such facts as it is able to prove. Such an inference may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge. You might, for example, think in this case it requires no great perception that the accused would have direct knowledge of events which can be canvassed only obliquely from the point of view of seeking to have you draw an inference from the evidence which has been led by the Crown. The use that you make of the fact that there is no evidence given or called by the defendant is that.

Later, his Honour returned to the fact that there was no evidence from the appellant, saying:

> I remind you that the consequence of that circumstance is that you have no evidence from the accused to explain the evidence put before you by the prosecution, and that moreover, this is a case where the truth is not easily ascertainable by the prosecution. You remember rather here it seeks to have you infer guilt from such facts as it is able to prove to your satisfaction. Such an inference may be more safely drawn from the proven facts when the accused elects not to give evidence of relevant facts which can be easily perceived to be in his knowledge.

The issue in this appeal is whether those directions were correct.

The argument for the appellant was made by reference to the right to silence and the recent decision of this Court in *Petty v. The Queen* [1991] 173 CLR 95. It was said in that case that an incident of the right to silence, which is a fundamental rule of the common law, is that "no adverse inference can be drawn against an accused person by reason of his or her failure to answer questions or to provide ... information" (*ibid.*, per Mason CJ., Deane, Toohey & McHugh JJ., at p. 99. Note the possible qualification of the right to silence for the offence of misprision of felony) when questioned as to the occurrence of an offence (See also, *ibid.*, per Brennan J. at pp. 106-107; Gaudron J. at p. 129; cf. Dawson J. at pp. 120-121). It was argued on behalf of the appellant that, as there is no obligation on an accused person to give evidence, the same must be true of his or her failure to do so. And, it was said, a statement that an inference of guilt might more easily be drawn because the accused did not give evidence is, in effect, an invitation to the jury to draw an inference adverse to the accused by reason of that fact.

The prosecution countered the submissions for the appellant by arguing that it has long been accepted that if, as in Queensland, there is no statutory prohibition on judicial comment as to the accused's failure to give evidence (Nor is there any statutory prohibition on comment by the prosecution. In New South Wales, the Northern Territory and Victoria legislation prohibits comment by the judge or the prosecution upon the accused's failure to testify: Crimes Act 1900 (NSW), s. 407(2); Evidence Act 1939 (N.T.), s. 9(3); Crimes Act 1958 (Vic.), s. 399(3). In Western Australia, Tasmania, South Australia and the Australian Capital Territory legislation prohibits comment by the prosecution only: Evidence Act 1906 (W.A.), s. 8(1)(c); Evidence Act 1910 (Tas), s. 85(1)(c); Evidence Act 1929 (SA), s. 18(1)II; Evidence Act 1971 (A.C.T.), s. 74(1)), it is permissible, in certain cases, to direct the jury along the lines involved in this case. It was put that the cases in which such a direction may be given are exemplified by those in which innocent explanation, if there is one, is something peculiarly within the knowledge of the accused. And, it was said, this was such a case.

Certainly, there is long standing authority to the effect that it is permissible, in some cases, to comment on the failure of an accused to give evidence. Thus it was said by the Privy Council in *Kops v. The Queen* [1894] AC 650, at p. 653:

> There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases. But on the other hand there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary.

There are many other authoritative statements to the same effect as *Kops* (See, for example, Lord Russell of Killowen CJ in *Reg. v. Rhodes* [1899] 1 QB 77, at p. 83. This passage, and that referred to above in *Kops v. The Queen*, is cited with approval by Windeyer J. in *Bridge v. The Queen* [1964] 118 CLR 600, at p. 613. See also *Waugh v. The King* [1950] AC 203, at pp. 211-212; *Mutch* [1972] 57 Cr. App. R. 196, at pp. 201-203; *Sparrow* [1973] 57 Cr. App. R. 352, at pp. 363-364; *Gallagher* [1974] 59 Cr. App. R. 239, at p. 245; *Stewart v. H.M. Advocate* [1980] SLT 245, at p. 252). Not all of them are confined to the failure of an accused person to give evidence at trial. However, many have that focus and, thus, it should be noted that, if failure to give evidence has any significance at all, it can only be in very limited circumstances. That is because regard must always be had to the presumption of innocence and the duty of the prosecution to prove guilt beyond reasonable doubt. In the light of those considerations, if failure to give evidence has significance, it can only be because it is reasonable, given the circumstances of the case, to expect that an innocent person would offer an explanation of the events in question and an explanation has not been advanced in some other way, either before or during the trial.

That it is the failure to explain, and not the failure to give evidence as such, that the authorities allow to be taken into account in appropriate circumstances clearly appears from a passage in *Wilson v. Buttery* [1926] SASR 150, at p. 154 which was approved by this Court in *May v. O'Sullivan* [1955] 92 CLR 654, at pp. 658-659. It was said in *Wilson v. Buttery* that:

> If the truth is not easily ascertainable by the prosecution, but is probably well known to the defendant, then the fact that no explanation or answer is forthcoming as might be expected if the truth were consistent with innocence, is a matter which the Court or jury may properly consider.

Not surprisingly, the cases which focus on the failure of an accused to give evidence, rather than the failure to explain, do not always provide clear guidance as to the circumstances in which that failure becomes significant. (See, for example, per Lawton LJ. in *Sparrow* [1973] 57 Cr. App. R., at p. 363, where it was said that "[w]hat is said must depend upon the facts of each case and in some cases the interests of justice call for a stronger comment. The trial Judge, who has the feel of the case, is the person who must exercise his discretion in this matter to ensure that a trial is fair. A discretion is not to be fettered by laying down rules and regulations for its exercise". This is cited with approval in *Gallagher* [1974] 59 Cr. App. R., at p. 245. See, to the same effect, *Reg. v. Rhodes* [1899] 1 QB, per Lord Russell of Killowen CJ at p. 83. See also *Haw Tua Tua v. Public Prosecutor* [1982] AC 136, at p. 153 where it was said that the inferences to be drawn from a refusal to give evidence "depend upon the circumstances of the particular case, and is a question to be decided by

applying ordinary commonsense".). However, some indication appears from *R. v. Burdett* [1820] 4 B. & Ald. 95, at pp. 121-122; [106 ER 873, at p. 883], where it was said:

> But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. ... It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just.

The first part of the passage quoted from *Burdett* is concerned with what is commonly called a "presumption of fact". That expression is apt to confuse because it may be used to convey two quite different things. It may be used to refer to a fact which is inferred from other facts, particularly if it is an inference which is commonly drawn (Note that it is used in this sense in Cross on **Evidence**, 4th Aust. Edn., (1991), par. 7215. Its use in this sense is criticised in Phipson on **Evidence**, 14th Edn., (1990), par. 5-02). It is in this sense that the word "presumption" is used in the passage quoted (It is also used in this sense in *Fitzpatrick v. Walter E. Cooper Pty. Ltd.* [1935] 54 CLR 200, per Dixon J. at p. 219 and in *Watts v. Rake* [1960] 108 CLR 158, per Dixon CJ at p. 159). On the other hand, it may be used to refer to an assumption which, in the absence of evidence one way or another, may and usually will be made by reason of commonsense or common experience. Such assumptions are sometimes called "evidentiary presumptions". (See, for example, *Reg. v. Falconer* [1990] 171 CLR 30, at p. 83 as to the assumed fact or the evidentiary presumption that an apparently conscious person acts voluntarily). A presumption, in this second sense, is involved in the observation in *Burdett* that there is "something like an admission" in the failure to lead rebutting evidence, although that does not clearly appear. It is a conjunction of presumptions, in each of the different senses indicated, which may, in certain cases, give significance to the failure of an accused person to offer an explanation of facts established by the prosecution case. For ease of expression and to avoid confusion, we refer hereafter to inferences and assumptions rather than presumptions.

Some facts, of which recent possession of stolen goods is a familiar example (See *Raviraj* [1986] 85 Cr. App. R. 93, at p. 103 where it is said that the so-called "doctrine of recent possession" is:

> only a particular aspect of the general proposition that where suspicious circumstances appear to demand an explanation, and no explanation or an entirely incredible explanation is given, the lack of explanation may warrant an inference of guilty knowledge in the defendant. This again is only part of a wider proposition that guilt may be inferred from unreasonable behaviour of a defendant when confronted with facts which seem to accuse.),

so obviously suggest a particular state of affairs that they give rise to an inference to that effect and also give rise to an assumption that an innocent person faced with those facts would offer some explanation of them. If no explanation is offered, the conclusion is that there is only one explanation and it is the one suggested by the objective facts.

The circumstances which so obviously suggest a particular conclusion that they call for an explanation, if there is one consistent with innocence, are not susceptible of definition. Nor can they be identified with particularity. However, they are confined by the presumption of innocence and the duty of the prosecution to prove guilt beyond reasonable doubt. In general terms, they fall into two broad categories. There are those, such as recent possession of stolen goods, where the objective facts give rise to an inference (in the sense of suggesting one and only one explanation) that the accused committed or was a party to the commission of the offence charged. Generally, cases in this category involve facts which are such that it can be said that the accused was "caught practically redhanded" (*Reg. v. McNamara* [1987] VR 855, at p. 860) as, for example, if found at the scene of a murder and in possession of the murder weapon. On the other hand, there are those which suggest that the accused is possessed of some special knowledge in the sense that he or she, above all others, knows something of the offence charged or something bearing on it. (See, for example, *Purdie v. Maxwell* [1960] NZLR 599, at p. 602; *Stewart v. H.M. Advocate* [1980] SLT, at p. 252; *Reg. v. Guiren* [1962] NSWR 1105, at p. 1107; *O'Sullivan v. Stubbs* [1952] SASR 61, at p. 62). For example, it may be established that the accused is the owner of the murder weapon, in which event there is an inference that the accused knows how the weapon left his or her possession, if, in fact, it did so and it is assumed

that an innocent person would account for its not being in his or her possession at the relevant time. (See, *R. v. Steinberg* [1931] OR 223, a case involving facts of this kind). The critical factor in cases of both kinds is that the facts are such as to give validity to the assumption that an innocent person would offer an explanation. Thus, it is sometimes said that the circumstances must be such that failure to explain is inconsistent with innocence. (See, for example, *Bruce v. The Queen* [1987] 61 ALJR 603, at p. 603; 74 ALR 219, at p. 219; *Wilson v. Buttery* [1926] SASR, at p. 154; *Reg. v. Guiren* [1962] NSWR, at p. 1107: cf. *Anderson v. Geerlings* [1988] 6 MVR 392, at p. 397 where there was an "equally consistent and rational explanation of the facts" and an inference could not be drawn because "to convict, the facts must be only consistent with the accused's guilt.").

It was argued for the appellant that the authorities which allow for judicial comment to be made as to the failure of an accused person to explain, even in the limited circumstances described, are inconsistent with the right to silence as explained in *Petty v. The Queen*. And it was put that, on that account, they should no longer be followed. However, there is a difference between mere silence or the absence of evidence, on the one hand, and, on the other, the failure to explain facts for which, it is assumed, an innocent person would offer some explanation. Where there is an assumption to that effect, the failure to explain is conduct which proves or tends to prove guilty knowledge on the part of the accused (See *Bruce v. The Queen* [1987] 61 ALJR 603; 74 ALR 219; *Reg. v. Hallocoglu* [1992] 29 NSWLR 67, at p. 78 where it was said: "The inference is that he did not [attempt to explain what had happened] because there was no acceptable explanation to be given") and is, itself, evidence.

The right to silence is, of course, concerned with more than the presumption of innocence and the duty of the prosecution to prove guilt beyond reasonable doubt. However, it is the presumption of innocence and the prosecution's burden of proof which preclude an adverse inference being drawn from silence which does not amount to evidence or, as we have called it, "mere silence". Because of the presumption and because of the burden of proof, silence of that kind proves nothing and provides no basis for any inference adverse to the accused. But neither the presumption of innocence nor the burden of proof bears upon the situation in which failure to explain is, itself, evidence. Nor does the privilege against incrimination: in circumstances involving an assumption that an innocent person would offer an explanation, the accused is not asked to testify against himself, but in favour of himself (Andrew Bruce comments to this effect in "The right to comment on the failure of the defendant to testify", [1932] 31 Michigan Law Review 226, at p. 233. Note also the observation in *Chandler* [1976] 63 Cr. App. R. 1, per Lawton LJ at p. 4 that:

> The law has long accepted that an accused person is not bound to incriminate himself; but it does not follow that a failure to answer an accusation or question when an answer could reasonably be expected may not provide some evidence in support of an accusation).

Given that failure to explain can amount to evidence, *albeit* in limited circumstances, there is no basis for departing from the authorities which acknowledge that, in those limited circumstances, it is appropriate to comment on the fact that particular evidence is unexplained or unanswered.

In the context of the right to silence, it is important to bear in mind that it is the failure to provide an "explanation or answer ... as might be expected if the truth were consistent with innocence" (*Wilson v. Buttery* [1926] SASR at p. 154) which is of evidentiary significance and not the failure to give evidence as such. In many cases, an explanation can be offered without the giving of evidence: it may, for example, be advanced when the person concerned is first confronted with the facts or it may be advanced in the course of the trial without evidence from the accused. Moreover, the assumption that an innocent person would offer an explanation loses all relevance if there has not been a real opportunity to explain. An opportunity of that kind, as was made clear in *Bruce v. The Queen*, does not encompass the situation in which the "accused, having been duly cautioned, declines to answer questions by the police in the exercise of his right to do so". ([1987] 61 ALJR at p. 603; 74 ALR at p. 219. Note that it was also there said that "the fact that the caution was given or that the right to silence was asserted or exercised does not itself provide an explanation" for the facts involved. See also *Petty v. The Queen* [1991] 173 CLR, per Gaudron J. at p. 127). Accordingly, directions should be given in terms of the unexplained facts, rather than in terms of

the failure to give evidence or to meet the prosecution case generally or the failure to answer questions from investigating police. (See *Bruce v. The Queen* [1987] 61 ALJR at p. 604; 74 ALR at p. 220). And to avoid any possibility of the jury giving significance to the accused's silence with respect to other matters, a direction, if one is to be given, should be precisely framed in terms of the particular facts which call for explanation in the sense indicated.

One other matter should be remembered with respect to the right to silence and its application in cases involving circumstances which call for an explanation in the sense indicated. If an explanation is offered, the question for the jury is whether that explanation is to be accepted as a reasonable possibility. If it is not, it is, in effect, no explanation at all. (See, for example, *R. v. Aves* [1950] 2 All ER 330; *Loughlin* [1951] 35 Cr. App. R. 69; *Raviraj* [1986] 85 Cr. App. R. at p. 103 and *Trainer v. The King* [1906] 4 CLR 126, at pp. 133-134, 138-139 where the failure to provide an acceptable explanation is treated as having the same significance as failure to provide an explanation at all). The fact that an explanation is advanced some time after a real opportunity to explain first presents itself may bear on whether it is to be accepted as a reasonable possibility. If an explanation is offered, the right to silence is not infringed merely by pointing out that the explanation was not given when a real opportunity first presented itself for, as already indicated, that ultimately goes to the question whether the facts are or are not explained. (See *Petty v. The Queen* [1991] 173 CLR, per Dawson J. at pp. 118-119; per Gaudron J. at pp. 125-127; see also per Brennan J. at pp. 104-105).

So far as the present case is concerned, the facts clearly suggest that the appellant, above all others, knew how he came to be in possession of the "Immanuel" with the personal belongings of Ms. Zack and Mr. Bayerl on board. And, since they have apparently disappeared, those facts provide ample foundation for an assumption that an innocent person would offer some explanation of that possession. Unexplained possession of the "Immanuel" was, in the circumstances, evidence which proved or tended to prove guilty knowledge with respect to that possession.

Moreover, only the appellant could know why he had given different accounts on different occasions as to the whereabouts of Ms. Zack and Mr. Bayerl. Without some explanation of his actions in that regard, the jury might well conclude that that was because he had something to conceal concerning the circumstances of their disappearance. And that was a matter the jury could take into account in relation to the offences charged if and to the extent it was satisfied that those actions were inconsistent with his innocence of them (See *Woon v. The Queen* [1964] 109 CLR 529, per Windeyer J. at pp. 541-542 where his Honour explains that:

> the inference which can be drawn from conduct and demeanour that displays a consciousness of guilt may depend upon whether there is other evidence pointing to the accused as guilty of the offence charged. When there is, false accounts of movements, false denials of knowledge of relevant facts, any conduct, utterance or demeanour demonstrative of guilt may go far to support a conclusion that the accused committed the very crime charged. But when there is no other evidence implicating the accused, an attitude of guilt, without more, may mean only that the accused was a participant in some wrongdoing, not that he committed the crime alleged, in manner and form alleged).

But beyond that, there is nothing in the evidence to provide the basis for an assumption that the appellant had some special knowledge as to the whereabouts of Ms. Zack and Mr. Bayerl, as might be suggested if, for example, it had been established that they sailed with him from Cairns. Much less can it be said that the facts so obviously implicate him in murdering them that they call for an explanation in the sense discussed.

The directions to the jury were defective in two important respects. They were couched in terms of the failure to give evidence, rather than in terms of the unexplained facts. And they were not confined to the appellant's unexplained possession of the "Immanuel" in the absence of Ms. Zack and Mr. Bayerl and his failure to explain the different accounts given by him on different occasions as to the whereabouts of Ms. Zack and Mr. Bayerl. Rather, they suggested that the appellant's failure to give evidence in relation to some matters entitled the jury to more readily draw an inference of guilt from the whole of the Crown case. As already indicated, neither his failure to give evidence nor his failure to explain the disappearance of Ms. Zack and Mr. Bayerl was a matter that could properly be taken into account on any of the charges.

So far as the directions to the jury permitted them to have regard to the failure of the appellant to give evidence they clearly constitute a serious miscarriage of justice which requires the convictions for murder to be set aside. They also constitute a serious miscarriage of justice with respect to the charge of stealing the "Immanuel", notwithstanding that the appellant's unexplained possession of the boat was a matter to which the jury could have regard in reaching a verdict on that particular charge. Although the case on the charge of stealing may be described as a strong one, the verdict was not inevitable. Given the terms of the directions, the jury may well have proceeded on the basis that the appellant's failure to give evidence with respect to the whereabouts of Ms. Zack and Mr. Bayerl was a matter which could be taken into account in reaching a verdict on that charge. Accordingly, all three convictions must be quashed.

The appeal should be allowed. The judgment and order of the Court of Criminal Appeal should be set aside and in lieu thereof it should be ordered that the appeal to that court be allowed, the convictions quashed and a new trial ordered on all charges.

TRAVICE ALLAN EDWARDS

v.

THE QUEEN

HIGH COURT, AUSTRALIA
BRENNAN, DEANE, DAWSON, GAUDRON & McHUGH JJ.
[F.C. 93/052]
17 NOVEMBER 1993

EVIDENCE: Corroboration of a lie told in witness box by accused - Whether lying amounts to an implied admission of guilt - Directions to be given to jury in cases where a lie may amount to corroborative evidence of guilt - The weight to be attached to a piece of evidence that appears to be a lie - Whether it involves satisfaction of a standard of proof or merely amounts to evidence that affects credibility of a witness.

The appellant appeals against a conviction of procuring one Glen Edward Williams (Williams) to commit an act of gross indecency upon him "by threats and by fear of bodily harm". The incidence was alleged to have occurred whilst the appellant, Williams and other prisoners were being transported to a different location in a cramped van which had no facility for observation of the prisoners during the journey. It was William's complaint that several prisoners harassed and beat him in the van and the appellant promised to protect him if he (Williams) agreed to perform oral sex on the appellant.

The only evidence on the incident for the prosecution case came from Williams. For the defence case, the only evidence was from the appellant. The appellant denied the offence and in fact denied knowledge of the facts of the incident, i.e. the harassment by the other prisoners, stating that he looked the other way. However, later under cross-examination, his testimony indicated he had heard and seen something of the event. The appellant insisted he did not want to get involved as he might be classed as a dog by other prisoners and face consequences in prison.

The trial judge had warned the jury of the dangers of convicting on the uncorroborated evidence of Williams. He also indicated that the appellant's contradictions in testimony could be regarded as lies and that the lies told in the witness box by the appellant were "capable of corroborating ... the complainant's evidence." The learned judge then went on to list the four